

January 21, 2009

MEMORANDUM

Subject: Endangered Species Act Determination for EPA's Approval under Clean Water Act Section 303(c) of Amendments to Arizona's Surface Water Quality Standards

From: Karen Irwin, Environmental Protection Specialist
Standards and TMDL Office (WTR-2)

Through: Janet Hashimoto, Chief
Standards and TMDL Office (WTR-2)

To: The Record

This memorandum documents EPA's determination that our approval of certain revisions and new provisions in Arizona surface water quality standards, subject to the completion and outcome of an Endangered Species Act (ESA) consultation with the U.S. Fish and Wildlife Service (FWS), is consistent with ESA. The revisions and new provisions subject to ESA consultation include those that affect Arizona's aquatic life and wildlife (A&W). This memorandum only addresses revisions and new provisions that EPA is approving at this time.

Procedural History of Arizona's Triennial Review:

The Arizona Department of Environmental Quality (ADEQ) adopted amendments to its water quality standards on December 2, 2008 (see Certificate of Approval of Final Rules from the Governor's Regulatory Review Council, Attachment 8 of the submittal). ADEQ's public participation process included a Notice of Proposed Rulemaking published in the Arizona Administrative Register on April 4, 2008 and re-published on April 25, 2008; formal hearings on May 19, 2008 and June 4, 2008; and a Notice of Final Rulemaking published in the Arizona Administrative Register on December 26, 2008, containing a responsiveness summary to public comments received. On January 9, 2009, EPA received Arizona's submittal requesting EPA approval of the amendments under CWA section 303(c)(2).

ESA Requirements:

Section 7(a)(2) of the ESA requires that federal agencies, in consultation with the Services, insure that actions they authorize, fund or carry out are not likely to jeopardize the continued existence of federally listed endangered or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. Following initiation of section 7(a)(2) consultation, section 7(d) of the ESA prohibits irreversible or irretrievable commitments of resources by federal agencies or applicants

that have the effect of foreclosing the formulation or implementation of reasonable and prudent alternatives which would not violate section 7(a)(2) of the ESA.

FWS Correspondence:

Within the context of ADEQ's rulemaking process, FWS reviewed the proposed revisions to Arizona standards (which have since been finalized) and provided comments to ADEQ. See July 29, 2008 letter from Steven Spangle, FWS, to Chris Varga, ADEQ and February 7, 2007 letter from Steven Spangle, FWS, to Steve Pawlowski, ADEQ. ADEQ responded to FWS comments contained in the July 29, 2008 letter in its Notice of Final Rulemaking (see responses to comments 86, 130 and 142). Comments provided by FWS are addressed in the following section of this memo.

Revisions to Arizona's Standards and ESA Analysis:

Definitions (R18-11-101)

ADEQ made minor, conforming, or editorial changes to various definitions, including: "acute toxicity", "agricultural irrigation", "agricultural livestock watering", "annual mean", "aquatic and wildlife (warm water)", "domestic water source", "existing use", "mixing zone," "oil," "perennial water," "pollutant," "practical quantitation limit," and "surface water." The definition of "90th percentile value" was relocated from "Definitions" to R18-11-109.F. Arizona Administrative Code (A.A.C.) R18-11-101.

ADEQ modified the definition of effluent-dependent waters to refer to point source discharges of wastewater, rather than discharges of treated wastewater. (See R18-11-101.17.) The revised definition clarifies that effluent-dependent water standards will be used to derive discharge limitations for *all* point source discharges of wastewater to an ephemeral water, including point source discharges of untreated cooling water and other industrial processes.

The term "outstanding Arizona water (OAW)" has replaced the term "unique waters" (R18-11-101.28.) as a clarification.

The rulemaking includes new definitions for several terms that were not previously used in the State's water quality standards rules, including: "assimilative capacity," "critical flow condition," "deep lake," "reference condition," "regulated discharge," "riffle habitat," "run habitat," "significant degradation," "wadeable," and "wastewater". *Id.*

ESA Analysis

We have reviewed the revisions to "Definitions". For editorial and clarifying changes, EPA finds they will have no effect on listed species or critical habitat. The modified definition of "effluent-dependent waters" is addressed under the subsection "Effluent-Dependent Waters (R18-11-113)" of this Memo. For additional definitions supporting

new requirements, EPA finds that by providing additional explanation of environmental terms, they will have a beneficial effect on listed species and critical habitat.

Applicability (R18-11-102)

R18-11-102.B.2 provides that the water quality standards in Article 1 do not apply to a man-made surface impoundment, ditch, or conveyance used in the extraction, beneficiation, or processing of metallic ores; R18-11-102.B.2 has been revised to clarify that applicability is only excluded if such impoundment, ditch, or conveyance is not a surface water or is located in an area that once was a surface water but is no longer a surface water because it has been and remains legally converted.

ADEQ added two new provisions to R18-11-102.B. R18-11-102.B.3 provides that surface water quality standards established in A.A.C., Title 18, do not apply to “A man-made cooling pond that is neither created in a surface water nor results from the impoundment of a surface water”. R18-11-102.B.4 provides that the standards do not apply to “A surface water located on tribal lands.”

ESA Analysis

The revision to R18-11-102.B.2 clarifies that the exclusion from water quality standards requirements provided to a man-made surface impoundment, ditch, or conveyance used in metallic ore mining does not extend to a surface water. The revised text was approved by EPA in a letter dated April 26, 1996 (see Notice of Final Rulemaking, Response to Comment #36, p. 4778.) Thus, ADEQ’s insertion of the EPA-approved language into R18-11-102.B.2 is a clarifying change.

The new provisions to exclude man-made cooling ponds that are not created in or resulting from the impoundment of a surface water and surface waters located on tribal lands clarify the scope of Arizona surface water quality standards.

For clarifying changes, EPA finds they will have no effect on listed species or critical habitat.

Antidegradation (R18-11-107 and R18-11-107.01)

Minor editorial revisions were made to R18-11-107, including relocation of the public hearing requirement to a new section, R18-11-107.01. The new section establishes criteria that ADEQ will use to implement its antidegradation program. The provision establishes criteria for “Tier 1”, “Tier 2”, and “Tier 3” waterbodies, as well as criteria governing the review of general permits, § 404 permits, and Arizona Pollutant Discharge Elimination System (AZPDES) stormwater permits.

ESA Analysis

For ESA section 7(a)(2) to apply, EPA must be taking an action in which it has sufficient discretionary federal involvement or control to protect listed species and/or critical habitat. EPA consultation requirements do not apply to actions where EPA lacks discretion to protect species or critical habitat, consistent with the FWS regulations implementing ESA section 7(a)(2) at 50 CFR 402.03. EPA has determined that it has no authority to require anything more than the requirements listed in 40 CFR 131.12 concerning antidegradation, and therefore it has no discretion to revise an otherwise approvable action to benefit or protect listed species or critical habitat, when it approves State-adopted antidegradation provisions that meet the requirements of 40 CFR 131.12. Therefore, EPA is not consulting on changes to ADEQ's Final Rulemaking concerning antidegradation provisions.

Narrative Standards (R18-11-108 and 108.01 and 108.02)

ADEQ adopted two new narrative standards to: prohibit solid waste in surface waters (R18-11-108.D) and establish a narrative biocriterion (R18-11-108.E). ADEQ also adopted new provisions addressing the criteria to be used when determining whether a specified narrative standard is being met.

R18-11-108.01 establishes narrative biological criteria to determine whether the standard in R18-11-108.E is being met in wadeable, perennial streams. R18-11-108.01 calls for the bioassessment of the subject stream, and comparison of the bioassessment results with an index of biological integrity derived from reference streams.

R18-11-108.02 establishes narrative bottom deposit criteria to determine if the State's standard related to excessive sedimentation and siltation (R18-11-108.A.1) is being met in wadeable, perennial streams.

ESA Analysis

The new narrative water quality standard to prohibit solid waste will have a beneficial effect on listed species and critical habitat to by prohibiting the dumping of trash in Arizona surface waters. The new narrative biocriterion and associated biological criteria for wadeable perennial streams will have a beneficial effect on listed species and critical habitat in that biocriteria can detect water quality problems that a chemically-based water quality standards program may miss or underestimate. Biocriteria directly measure the biological condition of surface waters. The new narrative bottom deposit criteria are intended to prevent excessive sedimentation and siltation in amounts that adversely effect aquatic life, and thus, will have a beneficial effect on listed species and critical habitat.

Numeric standards (R18-11-109)

ADEQ modified R18-11-109.A to allow *E. coli* densities to be expressed as a Most Probable Number; include a 30-day averaging period in the geometric mean standard; and change the single sample maximum concentration for the partial body contact designated use from 576 to 575.

ADEQ eliminated a numeric criterion limiting the maximum allowable change in pH due to discharge to 0.5 for full-body contact, partial-body contact, and A&W designated uses (R18-11-109.B).

With respect to the maximum allowable increase in ambient temperature due to a thermal discharge, ADEQ eliminated exclusions from this requirement for: Cholla Lake; a wastewater treatment plant discharge to a dry watercourse that creates an effluent-dependent water; and a stormwater discharge (R18-11-109.C, footnotes 2 and 3).

The suspended sediment concentration (SSC) standard for A&W coldwater was revised from 80 mg/L to 25 mg/L. (R18-11-109.D.1.) Other revisions to Section R18-11-109.D.1 include replacing the phrase “geometric mean (four sample minimum)” with “median value determined from a minimum of four samples” and additional text specifying that the four samples determining the median value are to be collected at least seven days apart.

Minor editorial changes were made to dissolved oxygen requirements. (R18-11-109.E.)

Total phosphorous and total nitrogen criteria were added for 2 reaches of Oak Creek. A 10 mg/L total nitrate standard was eliminated for the San Pedro River from Curtiss to Benson. (R18-11-109.F.)

ADEQ relocated water quality standards for radiochemicals (for the domestic water source designated use) from G.1, G.2, and G.5 to Appendix A, Table 1.

ESA Analysis

The revisions to *E. coli* standards and pH standards for full-body contact and partial-body contact designated uses are related to human-health criteria. For ESA section 7(a)(2) to apply, EPA must be taking an action in which it has sufficient discretionary federal involvement or control to protect listed species and/or critical habitat. EPA consultation requirements do not apply to actions where EPA lacks discretion to protect species and/or critical habitat, consistent with FWS regulations implementing ESA section 7(a)(2) at 50 CFR 402.03. Human health water quality criteria are designed to protect humans, not plants and animals. EPA's discretion to act on a State submission is limited to determining whether the criteria ensure the protection of designated uses upon which the criteria are based (i.e., use by humans). EPA has no discretion to revise an otherwise approvable human health criterion to benefit listed species or critical habitat. Therefore,

EPA is not consulting on changes to ADEQ's Final Rulemaking concerning human health criteria or provisions which are designed wholly for the protection of human health.

With respect to the repeal of numeric criteria limiting the maximum allowable change in pH for the A&W designated use due to discharge (R18-11-109.B), ADEQ indicates it could find no scientific basis or technical rationale for the current limitation on changes in pH. (See letter from Joan Card, ADEQ, to Alexis Strauss, EPA, January 7, 2009, p. 6.) ADEQ states that the limit was repealed because it is inconsistent with the expression of the pH standard as a range, there is no temporal element on the currently effective limitation on maximum change, and the absence of technical rationale to support the criterion. We find this explanation satisfactory and that the change will have no effect on listed species or critical habitat.

The temperature standard now applies to Cholla Lake, to a wastewater treatment plant discharge to a dry watercourse that creates an effluent-dependent water, and to a stormwater discharge. This revisions will have a beneficial effect on listed species and critical habitat by broadening coverage.

The revision of the SSC criterion for A&W coldwater from 80 mg/L to 25 mg/L is more protective. In its July 29, 2008 letter, FWS expressed support for the proposed SSC standard of 25 mg/L for A&W coldwater. Thus, we find that the revised standard will have a beneficial effect on listed species and critical habitat. Replacing the phrase “geometric mean (four sample minimum)” with “median value determined from a minimum of four samples” is a minor clarification. The additional text specifying that the four samples determining the median SSC value are to be collected at least seven days apart clarifies that the samples must be temporally independent. These revisions will have no effect on listed species and critical habitat.

We find that minor editorial changes to the dissolved oxygen requirements will have no effect on listed species or critical habitat.

The addition of new total phosphorous and total nitrogen criteria for two reaches of Oak Creek will have a beneficial effect by providing additional protections. With respect to elimination of the 10 mg/L total nitrate standard for the San Pedro River from Curtiss to Benson, ADEQ justifies this change by stating that the site-specific total nitrate standard corresponds to a domestic water source designated use, however, this designated use does not apply to the San Pedro River from Curtiss to Benson and the reach is not used as a drinking water source today. (See response to comment 87 in the Notice of Final Rulemaking.) Therefore, we find that this revision will have no effect on listed species and critical habitat.

The relocation of radiochemical standards from G.1, G.2, and G.5 to Appendix A, Table 1, is a minor editorial change that will have no effect on listed species or critical habitat.

Salinity Standards for the Colorado River (R18-11-110)

ADEQ updated the incorporation by reference to newer, more detailed implementation provisions, and made other minor editorial changes.

ESA Analysis

We find that minor editorial changes will have no effect on listed species or critical habitat. We find that updated references will have a beneficial effect on listed species and critical habitat by providing for more detailed implementation.

Analytical Methods (R18-11-111)

R18-11-111 has been revised to update statutory citations and to allow the use of EPA-approved methods for analysis of water and wastewater to determine compliance with a water quality standard.

ESA Analysis

We find that updated references will have a beneficial effect on listed species and critical habitat by providing for the use of appropriate analytical methods.

Outstanding Arizona Waters (R18-11-112)

R18-11-112, formerly captioned “Unique Waters”, has been revised. The provision now addresses waters classified as “outstanding Arizona waters (OAWs)”, and includes revised procedures by which waters receive that classification. R18-11-112.D.1 clarifies that an intermittent water can be classified as an OAW. Davidson Canyon and Fossil Creek have been added to the list of OAWs (R18-11-112.G.21 and .22, respectively.)

ESA Analysis

For editorial and clarifying changes, EPA finds they will have no effect on listed species or critical habitat. We find that the addition of two water bodies as OAWs will have a beneficial effect on listed species and critical habitat by providing for additional protections to these water bodies.

Effluent-Dependent Waters (R18-11-113)

ADEQ modified the definition of effluent-dependent waters to refer to point source discharges of wastewater, rather than discharges of treated wastewater. (R18-11-101.17 and R18-11-113.C.) A new section (R18-11-113.F) has been added enabling ADEQ to establish alternative water quality-based effluent limits in an Arizona Pollutant Discharge Elimination System (AZPDES) permit based on seasonal differences in the discharge. Also, waters classified as EDWs were formerly listed in R18-11-113.D; the list of EDWs is now found in Appendix B of the State’s water quality standards rules.

ESA Analysis

The revised definition of effluent-dependent waters (R18-11-113.C) clarifies that effluent-dependent water standards will be used to derive discharge limitations for *all* point source discharges of wastewater to an ephemeral water, including point source discharges of untreated cooling water and other industrial processes. The revised definition of effluent-dependent waters enables ADEQ to apply effluent-dependent waters standards to all point source discharges into ephemeral waters. Since effluent-dependent water A&W standards are more protective than A&W ephemeral water standards, the result will be a beneficial effect on listed species and critical habitat.

Enabling ADEQ to establish alternative water quality-based effluent limits in permits based on seasonal differences in the discharge (R18-11-113.F) would address circumstances, for example, in which annual variations in water flow affects the designated use and applicable standards. Any seasonal adjustments to AZPDES permit requirements are subject to EPA oversight. We believe the provision related to seasonal discharge differences will have no effect on listed species or critical habitat.

The relocation of EDW listings from R18-11-113.D to Appendix B is editorial. We find that editorial changes will have no effect on listed species or critical habitat.

Mixing Zones (R18-11-114)

ADEQ added a new provision prohibiting zones of initial dilution in a mixing zone that are so large that they cause lethality to drifting organisms that pass through.

ESA Analysis

The additional criteria for mixing zones provides increased protection to organisms, thus, we find it will have a beneficial effect on listed species or critical habitat.

Site-specific Standards (R18-11-115)

Arizona has adopted a new provision, R18-11-115, addressing ADEQ's authority to adopt site-specific standards that reflect local environmental conditions and the rule-making procedures to be used.

ESA Analysis

These recommended site-specific procedures are consistent with EPA policy. We find that the additional provision will have a beneficial effect on listed species and critical habitat.

Resource Management Agencies, Canals and Urban Park Lakes, Dams and Flood Control Structures, Schedules of Compliance, and Variances (R18-11-116, 117, 118, 121, and 122)

These sections contain minor editorial revisions.

ESA Analysis

EPA has reviewed the editorial changes and finds that will have no effect on listed species or critical habitat.

Discharge Prohibitions (R18-11-123)

R18-11-123 has been revised to prohibit point source discharges of wastewater to specified ephemeral waters that flow onto the Ak Chin Indian Reservation. Other changes are editorial.

ESA Analysis

EPA finds that the additional prohibitions will have a beneficial effect on listed species and critical habitat. We find that editorial changes will have no effect on listed species or critical habitat.

Appendix A. Numeric Water Quality Standards

ADEQ has revised numeric water quality criteria to reflect changes in criteria derivation methodologies, revised exposure assumptions, new information, and data on human health effects or new toxicity data that support a revision of aquatic life criteria.

ADEQ revised numeric A&W criteria with respect to several parameters. The majority of revisions relate to updating the criteria to be consistent with EPA's Clean Water Act (CWA) 304(a) national criteria recommendations. For criteria updated to be consistent with EPA's national recommendations, the revisions have largely resulted in more protective criteria, including "newly regulated" parameters. Among other revised criteria, ADEQ adopted acute and chronic criteria for total ammonia for effluent-dependent waters. A&W criteria updated to be consistent with EPA's national 304(a) criteria correspond to the following pollutants: Aldrin, Ammonia, Arsenic, Cadmium, Chlorine, Chlorpyrifos, Chromium III, Copper, p,p'-Dichlorodiphenyl dichloroethane (DDD), p,p'-Dichlorodiphenyl dichloroethylene (DDE), Dieldrin, Endrin, Guthion, Hexachlorocyclohexane gamma (lindane), Hydrogen Sulfide, Iron, Lead, Malathion, Mercury, Mirex, Nickel, Parathion, Silver, Toxaphene¹, Tributyltin, and Zinc.

For 6 parameters, ADEQ rounded criteria to the nearest first significant figure to the right of the decimal point.

¹ Specifically, consultation is for the chronic criteria for aquatic and wildlife warmwater and effluent-dependent waters designated uses.

ADEQ adopted a new fish tissue methylmercury criteria of 0.3 mg/kg for the fish consumption designated use and revised the mercury A&W criteria for effluent dependent waters to be more protective; the acute criteria was revised from 2.6 ug/L to 2.4 ug/L and the chronic criteria was revised from 0.2 ug/L to 0.01 ug/L.

For 7 hardness-dependent dissolved metals criteria, ADEQ removed the lower hardness cap of 25 mg/L, which has the effect of increased protection at hardness levels below 25 mg/L. ADEQ calculated the criteria for hardness-dependent metals using equations prescribed by EPA in its 304(a) national criteria recommendations, resulting in updated cadmium criteria.

ADEQ also revised criteria for the domestic water source and fish consumption designated uses.

ESA Analysis

In its July 29, 2008 letter, FWS commented on the proposed revisions (now finalized) to the acute and chronic mercury criteria for effluent dependent waters, the fish tissue methylmercury criteria, and the acute and chronic ammonia criteria for effluent dependent waters. FWS supported the proposed revisions to the acute and chronic mercury criteria for effluent-dependent waters but suggested that even lower criteria would be better. FWS also supported the newly adopted fish tissue methylmercury criteria and the newly adopted ammonia criteria for effluent-dependent waters. We note that FWS raised no objections to ADEQ's proposed revisions to numeric criteria in its letter to ADEQ.

As previously noted, ADEQ updated many of its A&W numeric criteria to be consistent with CWA 304(a) national criteria recommendations. For these changes, ESA consultation can be deferred to national consultation for CWA 304(a) criteria. EPA guidelines for ESA consultations² provide that, during the national CWA 304(a) consultations, EPA may approve state water quality criteria that are identical or more stringent than the existing CWA 304(a) criteria, pending the results of the national consultations, and that such action will be covered by the national consultation. Consequently, in accordance with the MOA, Region 9 is deferring consultation on revisions to Arizona standards that consist of updating criteria for consistency with CWA 304(a) national criteria, and will approve the amendments subject to the results of national consultation under section 7 of the ESA.

With regard to ADEQ's adoption of more protective numeric criteria, we find that such revisions will have a beneficial effect on listed species or critical habitat.

² *Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service, and National Marine Fisheries Service Regarding Enhanced Coordination Under the Clean Water Act and Endangered Species Act* (MOA, EPA-823-R-02-003), August 2002.

Regarding mathematical rounding of criteria for 6 parameters, out of a total of 19 rounded criteria for the 6 parameters, all but 2 were rounded down, thereby resulting in a standard at least as protective. The 2 values rounded up are the A&W effluent dependent water acute criteria for heptachlor and heptachlor epoxide, rounded from 0.58 ug/L to 0.6 ug/L. In considering the method detection limits for these parameters, available references show the detection limits to be equal to or higher than the 0.02 ug/L increase in the criteria due to rounding. Thus, this revision will have no effect on listed species or critical habitat in terms of the practical application of the standard.³

The new methylmercury fish tissue standard and revised criteria for the domestic water source and fish consumption designated uses concern human-health criteria. For ESA section 7(a)(2) to apply, EPA must be taking an action in which it has sufficient discretionary federal involvement or control to protect listed species and/or critical habitat. EPA consultation requirements do not apply to actions where EPA lacks discretion to protect species and/or critical habitat, consistent with FWS regulations implementing ESA section 7(a)(2) at 50 CFR 402.03. Human health water quality criteria are designed to protect humans, not plants and animals. EPA's discretion to act on a State submission is limited to determining whether the criteria ensure the protection of designated uses upon which the criteria are based (i.e., use by humans). EPA has no discretion to revise an otherwise approvable human health criterion to benefit listed species or critical habitat. Therefore, EPA is not consulting on changes to ADEQ's Final Rulemaking concerning human health criteria or provisions which are designed wholly for the protection of human health.

Appendix B. Surface Waters and Designated Uses

ADEQ has added designated uses for water bodies, including lake categories associated with the newly adopted narrative nutrients criteria (note: EPA is not acting on section R18-11-108.03).

ESA Analysis

Additional designated uses for water bodies render enhanced protection by applying water quality standards designed to protect the identified designated use. We find that these revisions will have a beneficial effect on listed species and critical habitat.

³ EPA's drinking water standard for heptachlor is 0.4 ug/L and 0.2 ug/L for heptachlor epoxide, based on the ability of public water systems to detect and remove contaminants using suitable treatment technologies. (www.epa.gov/ogwdw/contaminants/dw_contamfs/heptachl.html.) A 2002 report titled "Summary of Well Water Quality City of Ann Arbor" shows a method detection limit of 0.04 ug/L for heptachlor and 0.02 ug/L for heptachlor epoxide; these values are equal to or greater than the change to Arizona's criteria of 0.02 ug/L.

Appendix C. Site-Specific Standards

ADEQ revised site-specific criteria for total residual chlorine and selenium for the Colorado River near Yuma from default A&W criteria of 11 ug/L (acute) and 5 ug/L (chronic) for total residual chlorine to 33 ug/L (acute) and 20 ug/L (chronic) and from 2 ug/L to 2.2 ug/L for selenium.

ESA Analysis

Regarding site-specific revisions to the total residual chlorine and selenium criteria for the Colorado River near Yuma, FWS reviewed and commented on these revisions in a February 7, 2007 letter to ADEQ. In its letter, FWS indicates that it supports the revised total residual chlorine and selenium criteria, which enable the re-creation of about 1,418 acres of native marsh and riparian communities for wildlife in the Colorado River ecosystem. (FWS also recommends quarterly monitoring of selenium in the discharge of spent filter backwash water and waters of the Yuma East Wetlands.) Due to the net ecological benefit resulting from the revisions and support expressed by FWS, we find that they will have an overall beneficial effect on listed species or critical habitat.

ESA Section 7(d) Requirement:

With regard to criteria for which consultation is deferred to the national level, EPA has explicitly stated that it retains its discretion to take appropriate action within CWA authorities if the consultation identifies deficiencies in the criteria requiring response by EPA.

EPA's approval decision does not foreclose either the formulation by FWS, or the implementation by EPA, of any alternatives that might be determined in the consultation to be needed to comply with section 7(a)(2). By approving the standards "subject to the results of our consultation with the U.S. Fish and Wildlife Service (FWS) under section 7(a)(2) of the Endangered Species Act", EPA has explicitly stated that it retains its discretion to take appropriate action if the consultation identifies deficiencies in the standards requiring remedial action by EPA. EPA retains the full range of options available under section 303(c) for ensuring water quality standards are environmentally protective. EPA can, for example, work with Arizona to ensure that Arizona revises its standards as needed to ensure listed species' protection, initiate rulemaking under section 303(c)(4)(B) of the CWA to promulgate federal standards to supersede the State/Tribal standards or, in appropriate circumstances, change EPA's approval to a disapproval.

EPA Region 9's approval decision does not set into motion any circumstances that would cause an irreversible or irretrievable commitment of resources that would have the effect of foreclosing the formulation or implementation of reasonable and prudent alternatives that might be determined in the consultation to be needed to comply with section 7(a)(2). Such approval is thus consistent with section 7(d). Where the revisions

consist of updated criteria to be consistent with EPA's CWA 304(a) national criteria, we have deferred consultation to the national level.

Conclusion:

ESA consultation requirements do not apply to water quality standards revisions related to antidegradation and human health.

For other revisions that EPA is approving, we have found the revisions will have no effect on listed species or critical habitat or a beneficial effect on listed species and critical habitat. ESA consultation is not required for revisions that will have no effect on listed species or critical habitat. [50 Code of Regulations (CFR) 402.03(b)(1).] Newly adopted ESA regulations [(50 CFR 402.03(b)(3)(ii))] do not require ESA consultation for revisions that will have beneficial effects on listed species or critical habitat. See also, 50 CFR 402.14.

With regard to criteria for which consultation is deferred to the national level, EPA believes it is generally better from an environmental standpoint for the revised Arizona A&W criteria, that EPA is approving, to be in place pending EPA's completion of ESA consultation for nationally-recommended criteria. EPA retains its discretion to take appropriate action within CWA authority if the consultation raises issues.